92-966

No.

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

M. MAUREEN POLSBY, M.D., PETITIONER

v.

LOUIS W. SULLIVAN, M.D., SECRETARY OF HEALTH AND HUMAN SERVICES, DR. THOMAS CHASE, DR. IRWIN J. KOPIN, DR. MARK HALLETT, DR. DANIEL R. WEINBERGER, DR. GIOVANNI DICHIRO, DR. MARINOS DALAKIS, DR. RICHARD E. CARSON, DR. MURRAY GOLDSTEIN, in his official capacity as director of the National Institute of Neurologic and Communicative Disorder and Stroke, DR. JAMES B. WYNGAARDEN, in his official capacity as director of the National Institutes of Health, RESPONDENTS

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the anti-retaliation provision, 42 U.S.C. § 2000e-3(a) in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17, which forbids an employer from "discriminat[ing] against any of his employees or applicants for employment * * * because he has made a charge * * * under this subchapter," protects *former* employees from retaliation.

2. Whether a claimant has raised a triable issue of fact under 29 C.F.R. § 1613.214(a)(4) by unequivocally asserting that she was never notified or otherwise aware of the 30-day time period within which an employee must contact an Equal Employment Opportunity Counselor and the record contains no evidence that she was notified of the time limit.

3. Whether a federal agency's failure to comply with its regulatory responsibility under 29 C.F.R. § 1613.204(f)(4) to post notice of the 30-day time limit for a federal employee to contact an Equal Employment Opportunity Counselor equitably tolls that time limit when the complainant was not otherwise notified or aware of that time limit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

M. Maureen Polsby, M.D., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 970 F.2d 1360. The district court's opinion dismissing all defendants but the Department of Health and Human Services and all claims other than those brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 ("Title VII") (App., *infra*, 22a-25a) is unreported. That court's opinion denying Dr. Polsby's motion to amend her complaint (App., *infra*, 26a-30a) is unreported but can be found at 1990 WL 27874. The court's opinion granting the defendants' motion for summary judgment (App., *infra*, 31a-37a) is unreported. Its opinion denying Dr. Polsby's motion for reconsideration (App., *infra*, 38a-39a) is also unreported.

JURISDICTION

The court of appeals entered its opinion on July 29, 1992 and amended that opinion on August 12, 1992 (App., *infra*, 1a). The court of appeals denied Dr. Polsby's petition for rehearing on September 8, 1992 (App., *infra*, 19a-21a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Title VII's anti-retaliation provision, 42 U.S.C. § 2000e-3(a), provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

The provision that makes Title VII applicable to the federal government, 42 U.S.C. § 2000e-16, provides in relevant part:

> (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in

section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

* * * * *

(c) Within 90 days[1/] of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex, or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on

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1. When Dr. Polsby filed her complaint, this provision required that a civil action be initiated within 30 rather than 90 days.

> appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency or unit, as appropriate, shall be the defendant.

29 C.F.R. § 1613.204(f)(4) provides in relevant part: "an agency shall * * * * * [p]ublicize to its employees and post permanently on its official bulletin boards: [t]ime limits for contacting an Equal Employment Opportunity Counselor."

29 C.F.R. § 1613.214(a) provides in relevant part:

> *Time limits.* (1) An agency shall require that a complaint be submitted in writing by the complainant or representative and be signed by the complainant. The complaint may be delivered in person or submitted by mail. The agency may accept the complaint for processing in accordance with this subpart only if:
>
> The complainant brought to the attention of the Equal Employment Opportunity Counselor the matter causing him/her to believe he/she had been discriminated against within 30 calendar days of the date of

> the alleged discriminatory event, the effective date of an alleged discriminatory personnel action, or the date that the aggrieved person knew or reasonably should have known of the discriminatory event or personnel action;
>
> * * * * *
>
> The agency shall extend the time limits in this section when the complainant shows that he/she was not notified of the time limits and was not otherwise aware of them, was prevented by circumstances beyond the complainant's control from submitting the matter within the time limits; or for other reasons considered sufficient by the agency.

29 C.F.R. § 1613.215(a)(4) provides: "The agency head or designee shall reject or cancel a complaint * * * [t]hat is filed untimely, unless the agency extended the time limits in accordance with § 1613.214(a)(4)."

STATEMENT

A. Factual Background

In 1982, petitioner, M. Maureen Polsby, M.D., accepted a staff medical fellowship at the National Institutes of Health ("NIH"). At the time, Dr. Polsby was completing her residency training at the New England Medical Center of Tufts University in Boston ("Tufts"), where she was Chief Resident in Neurology. Dr. Thomas Chase, then Scientific Director of the National Institute of Neurological and Communicative Disorders and Stroke

("NINCDS")[2] a division of NIH, had offered her the prestigious fellowship. During the two-year appointment (plus a third year if she so chose), Dr. Polsby would report directly to Dr. Chase. As an NIH fellow, she could conduct medical research of her own under the tutelage of experienced NIH scientists and with access to NIH's vast resources. The fellowship he offered virtually assured Dr. Polsby an illustrious career in academic medicine, either at NIH or at some other eminent medical institution.

Dr. Polsby accepted Dr. Chase's offer for the fellowship and later decided to leave Tufts approximately three months before her residency ended, but only after Dr. Chase told her that she could obtain the remaining residency credit at NIH. C.A. App. 11. She needed the residency credit to obtain hospital admitting privileges, join a group practice, and take the neurology examination offered by the American Board of Psychiatry and Neurology ("Board") to become Board-certified in neurology.

In April 1983, after Dr. Polsby left Tufts but before she began the fellowship, she encountered Dr. Chase at the annual meeting of the American Academy of Neurology, where Dr. Polsby was to present a scientific paper. Dr. Chase, her future boss, invited Dr. Polsby to dinner and, to her dismay, pressured her to forgo the rest of the conference and vacation with him in Mexico instead. Dr.

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[2] NINCDS is now the National Institute of Neurological Disorders and Stroke.

Polsby graciously but firmly resisted his advances, presented her paper, and returned home. C.A. App. 12.

Although Dr. Polsby was willing to forget Dr. Chase's unwanted advances, he was not willing to forget her rejection. After Dr. Polsby arrived at NINCDS, Dr. Chase treated her differently from the other fellows, who were all males. C.A. App. 60. He assigned her a disproportionate share of the support duties normally shared equally among the fellows, loaded her down with administrative tasks, and expected her to help the male fellows conduct their research rather than to pursue her own projects. C.A. App. 12. Dr. Polsby saw patients whom no one else wanted to see, answered all telephone calls and letters of referral regarding patients and ongoing research, and pulled night duty in the hospital. C.A. App. 420. In stark contrast to his treatment of Dr. Polsby, Dr. Chase allowed the other first-year NINCDS fellow (a male) to focus exclusively on his own research without assuming any of the myriad responsibilities that filled Dr. Polsby's days. C.A. App. 423. She was denied an equal opportunity to do full-time research (C.A. App. 12, 423, 723-24), and never received the promised support for the research she did pursue. Dr. Chase rejected all of her project proposals, usually for nonsensical reasons or because she had too many administrative and support responsibilities. C.A. App. 12, 723-24.

Meanwhile, Dr. Polsby was appalled to learn that Dr. Chase had a reputation as a notorious womanizer and that many at NINCDS believed that Dr. Chase hired her, his first female medical staff fellow ever (C.A. App. 12), because he was having an affair with her. C.A. App. 723. One of the NIH Branch Chiefs even jokingly suggested

that she sleep with Dr. Chase and save herself "all this trouble." C.A. App. 422.

In addition to being incorrectly thought of as Dr. Chase's girlfriend, Dr. Polsby endured other sex stereotyping and double standards while at NINCDS. C.A. App. 491-92, 724. Discovery in this case revealed some of that treatment. For example, during his deposition, Dr. Irwin Kopin, NINCDS's new Scientific Director, criticized Dr. Polsby's attire. When asked whether Dr. Polsby comported herself professionally, he responded "verbally, yes" but added:

> She was always somewhat overdressed sort of. She seemed more like a visitor to NIH than somebody who was an employee, and it's not anything I could really hold against her. She was a young attractive woman who came in almost like dressed to kill but just overdressed, I thought, for the type of work that she was doing. But it was pleasant to see her and I had really no complaints about that. But I didn't feel that it was particularly appropriate for the type of work she was doing.

C.A. App. 491-92. Dr. Polsby "overdressed" by wearing a business suit or dress under a lab coat with nylons and heels. C.A. App. 724.

In spite of ill treatment and the shadow that Dr. Chase's reputation as a womanizer cast over her, Dr. Polsby was well liked. See C.A. App. 723, 729. She was also well respected, no doubt because she managed to accomplish significant research despite Dr. Chase's obstructions. For example, by collaborating with a

colleague not under Dr. Chase's control, she prepared a paper on progressive supranuclear palsy, which the American Academy of Neurology accepted for presentation at its 1985 meeting. C.A. App. 12-13, 554-55. Dr. Polsby also developed a project involving patients suffering from spasmodic torticollis, a movement disorder similar to Parkinson's Disease. C.A. App. 13, 555. However, after Dr. Polsby recruited the patients, developed research ideas, and obtained preliminary data, her torticollis research was appropriated by Dr. Chase and two male colleagues, Dr. Daniel Weinberger and an incoming fellow, Dr. Dieter Naber. Drs. Chase, Weinberger, and Naber published her work without her knowledge or permission, and, as Dr. Polsby later learned, with fabricated data.[3] App., *infra*, 4a; C.A. App. 423-25, 612.

After experiencing this unfair treatment for several months, Dr. Polsby sought help from Dr. Kopin (Dr. Chase's superior) and later from Dr. Hallett (the NINCDS Clinical Director). C.A. App. 421-22. They agreed that she was being badly treated but claimed they could do

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[3] In that paper, published in 1988, Drs. Chase, Naber, and Weinberger listed Dr. Polsby as a fourth author (without her knowledge or permission). Her placement as the fourth rather than the first (considered the primary author) or the last author (considered the most senior) failed to credit her properly for her research. C.A. App. 182; see also C.A. App. 484-86.

In addition to publishing the torticollis paper containing fraudulent data, some of the defendants presented Dr. Polsby's work on Lou Gehrig's Disease at a major medical meeting without her knowledge or permission. In that paper, the defendants did not credit Dr. Polsby's role, and tried to disguise the fact that her results had cast doubt on some of their earlier work. See C.A. App. 13, 179-80.

nothing about it. C.A. App. 257-58. Finally, about three-quarters through her appointment at NINCDS, Drs. Kopin and Hallett did transfer Dr. Polsby from Dr. Chase's supervision to that of Dr. Giovanni DiChiro, but in such a way as to cut her off from all of her previous research. C.A. App. 427-28.

Because the unfair treatment had not been addressed, Dr. Polsby then sought advice about filing a sex discrimination complaint. A physician at NIH referred Dr. Polsby to someone he described to her as an Equal Employment Opportunity ("EEO") Counselor ("Counselor"). C.A. App. 724.[4] The Counselor discouraged Dr. Polsby from filing a complaint and warned her that filing a complaint would ruin her career. The Counselor never told her that federal employees must contact an EEO Counselor within 30 days of the alleged discrimination (App., *infra*, 3a; C.A. App. 724); nor did Dr. Polsby ever see any posters or received any information from NIH regarding any time limits for contacting an EEO Counselor (C.A. App. 725). Nevertheless, concerned about protecting her rights, Dr. Polsby sought advice of others outside of NIH, who mistakenly assured her that she had six months after her fellowship ended to file a complaint. App., *infra*, 3a; C.A. App. 581. (Six months was the time limit for filing a complaint with the Equal

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4. The record does not reflect, and Dr. Polsby does not know, whether the person so described was in fact an EEO Counselor when Dr. Polsby spoke with her. Apparently mistaking Dr. Polsby's care in pleading for a concession, the Fourth Circuit repeatedly either stated or assumed that the person had been described incorrectly. App., *infra*, 3a, 8a. Nothing in the record supports that conclusion.

Opportunity Employment Office ("EEOC") against a private employer. See 42 U.S.C. § 2000e-5(e).)

In June 1985, despite Dr. Chase's representations to the contrary when he offered Dr. Polsby the position, Dr. Polsby learned that her fellowship would not be renewed for the critical third year, even though every other fellow who had wanted the third year received it. Dr. Chase's other fellows (all males) stayed that third year. C.A. App. 725. The third year enabled those fellows, but not Dr. Polsby, to polish their research skills and demonstrate their abilities. See C.A. App. 419. Deprived of that opportunity, Dr. Polsby left NINCDS on July 9, 1985. App., *infra*, 3a.

On December 13, 1985, well within the six-month period she believed she had to file a complaint, Dr. Polsby contacted the EEO Counselor in the NIH EEO office. The EEO Counselor advised her that "while [her] complaint was initiated more than 30 days after the alleged discrimination, counseling would proceed and the timeliness of the complaint would be determined by the DHHS [Department of Health and Human Services] if a formal complaint is filed." C.A. App. 553. After informal counseling at NIH failed to resolve Dr. Polsby's differences with NIH, she filed a formal administrative complaint naming Dr. Chase, as well as Drs. Kopin and Hallett, and others, with the Department of Health and Human Services ("HHS"). When HHS accepted her complaint, Dr. Polsby concluded that her failure to meet the 30-day deadline was not an issue.

Shortly after she filed her administrative complaint and at the request of the American Board of Psychiatry and

Neurology ("Board"), Dr. Polsby asked NIH to provide a letter describing her time at NIH to the Board. App., *infra*, 3a; C.A. App. 509. On December 24, 1985, Dr. Mark Hallett sent a letter to the Board but did not copy it to Dr. Polsby. In the letter Dr. Hallett stated, contrary to prior representations by Dr. Chase (C.A. App. 11), that Dr. Polsby's time at NIH could not be credited toward her residency requirements (C.A. App. 584). App., *infra*, 3a. The withholding of residency credit effectively destroyed Dr. Polsby's medical career. C.A. App. 15, 58. Without proper residency credit, Dr. Polsby could not sit for the Board examination to become a Board-certified neurologist (C.A. App. 58), nor could she obtain hospital admitting privileges or work as a neurologist. C.A. App. 15. She also lost her appointment to the clinical faculty of Georgetown University School of Medicine.

When Dr. Polsby finally learned of the letter, she twice asked Dr. Hallett to correct it. Despite the serious ramifications of the error in his letter, he refused. App., *infra*, 3a; C.A. App. 300. Dr. Polsby then added retaliation claims to her administrative complaint.

HHS investigated Dr. Polsby's complaint and two and a half years later issued a Final Disposition ("Disposition"). App., *infra*, 4a. Relying on the statements of NIH personnel, the agency found that the evidence did not support Dr. Polsby's discrimination or retaliation claims. *Ibid.* In that Disposition, HHS noted that Dr. Polsby "stated that she did not file her initial complaint within the allotted 30-day time period because she was erroneously advised that she had six months in which to file." See *ibid.*; C.A. App. 58. Nothing in the Disposition suggested that the agency was rejecting Dr. Polsby's

explanation for failing to file within 30 days. On the contrary, the Disposition reached the merits. After she received the Disposition, Dr. Polsby filed this action.

B. The Proceedings Below

Dr. Polsby's pro se complaint (drafted with the assistance of an attorney) alleged sex discrimination in violation of Title VII and seven common law torts. App., *infra*, 4a. She named as the defendants certain NINCDS employees, the Director of NINCDS, the Director of NIH, and the Secretary of the Department of Health and Human Services ("HHS"). She sued the latter three defendants in their official capacities only. See C.A. App. 7.

The defendants moved to dismiss Dr. Polsby's complaint on several grounds but did not question the timeliness of her administrative complaint. The district court dismissed all the defendants except HHS and all claims except those under Title VII on the ground that Title VII was Dr. Polsby's exclusive remedy. App., *infra*, 22a-25a.

The remaining defendant, HHS, answered Dr. Polsby's complaint on September 25, 1989. Unlike the motion to dismiss, the answer addressed the timeliness and exhaustion issues. The answer "admit[ted] that Dr. Polsby's complaint was accepted by the Department of Health and Human Services" and that Dr. Polsby had exhausted her administrative remedies. App., *infra*, 4a; C.A. App. 16, 134. The answer did not raise Dr. Polsby's failure to contact an EEO Counselor within 30 days as an affirmative defense. C.A. App. 16, 134. In fact, it raised no affirmative defenses at all. App., *infra*, 4a.

After Dr. Polsby obtained counsel and discovered that some of the defendants had published her spasmodic torticollis research without her permission and with fraudulent data, she sought leave to amend the complaint to assert new allegations regarding the article. App., *infra*, 4a; C.A. App. 164. The district court denied the motion, holding that the proposed claims restated the dismissed claims involving the same defendants and that Title VII was Dr. Polsby's exclusive remedy. App., *infra*, 4a.

On July 15, 1991, more than five and a half years after Dr. Polsby contacted an EEO counselor and nearly three years after she sued, HHS moved for summary judgment on the grounds that the claims were time barred and that Dr. Polsby could not make out a prima facie case of retaliation. App., *infra*, 5a. HHS asserted for the first time that Dr. Polsby's failure to seek EEO counseling within 30 days after the end of her fellowship barred her suit.

The district court agreed that Dr. Polsby's claims were time barred because she did not contact an EEO counselor within 30 days of the alleged discrimination. It further held that dismissal of her underlying discrimination claims required dismissal of her retaliation claims. Even so, in its order denying Dr. Polsby's motion for reconsideration, the district court acknowledged that Dr. Polsby had "describe[d] a sexist atmosphere at NIH, discriminatory treatment at NIH, and retaliatory conduct by NIH following the filing of her EEO Complaint." C.A. App. 732. The court also stated that it "appreciates the frustration of the Plaintiff in that she was not aware of the thirty day limit." *Ibid.*

The court of appeals affirmed. The court held that HHS had not waived the time-bar defense by waiting five and a half years before raising it on the eve of trial and after discovery had closed. It also swept aside HHS's failure to raise the affirmative defense in its answer on the ground that it had "allowed affirmative defenses to be pled in pre-trial motions and cannot find any abuse of discretion by the district court in permitting HHS to raise this defense after the answer." App., *infra*, 8a. The court also ruled that the 30-day limit should not be tolled under either equitable tolling principles or the relevant federal regulations. App., *infra*, 6a-8a. The court of appeals rejected Dr. Polsby's retaliatory discrimination claims on a ground neither briefed nor argued by the parties. App., *infra*, 10a-16a. Expressly repudiating decisions of the Second, Tenth, and Eleventh Circuits as "unpersuasive" and agreeing with a contrary decision by the Seventh Circuit, the court held that Title VII does not protect former employees from retaliation when they file discrimination complaints. App., *infra*, 12a. The court also deemed Dr. Polsby's discrimination claims untimely, overlooking the fact that some of the alleged acts of discrimination occurred less than 30 days before Dr. Polsby amended her complaint to include retaliatory discrimination. See App. Reply Br. 16-17 & n.9; C.A. App. 242, 279, 542; App., *infra*, 10a.[5/]

[5.] The court also upheld the district court's refusal to allow Dr. Polsby to amend her complaint. That holding is not addressed by this petition.

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT'S RULING THAT TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. §§ 2000E-2000E-17, DOES NOT PROTECT FORMER EMPLOYEES FROM RETALIATION CONFLICTS WITH THE DECISIONS OF FOUR CIRCUITS AND CANNOT BE RECONCILED WITH THE DECISIONS OF FOUR OTHER CIRCUITS

Expressly placing itself into conflict with other circuits, the Fourth Circuit held that Dr. Polsby could not bring her Title VII retaliation claims under 42 U.S.C. § 2000e-3(a) because she was no longer employed by NIH when the retaliation occurred, and Title VII "provides no cause of action against a former employer by an ex-employee for acts of retaliation after the employment had ended." App., *infra*, 10a-11a.[6/] That interpretation of Title VII

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6. The court also concluded that Dr. Polsby's retaliation claims were time barred because she did not amend her administrative complaint to include retaliation claims until more than 30 days after Dr. Hallett wrote the letter denying her residency credit. App., *infra*, 10a. Dr. Hallett did not copy the letter to Dr. Polsby, however, so she could not have learned of its existence, much less its contents, immediately, nor could she have known about the retaliation on January 30, 1986, or she would have included it in the administrative complaint she filed with HHS. Sometime between January 30th and February 19th, when she amended her complaint to allege retaliation, Dr. Polsby must have discovered the retaliation. The court, assuming that Dr. Polsby knew about the letter immediately, counted the 30 days from the day Dr. Hallett wrote the letter. The court also refused to consider Dr. Hallett's subsequent refusals to correct the letter as retaliation, instead labeling them as a "failure to correct a *past* discrimination." App., *infra*, 10a (emphasis added). The court did not explain how a refusal to correct a past wrong, when the individual has

directly conflicts with the decisions of the Second, Ninth, Tenth, and Eleventh Circuits. See *Sherman* v. *Burke Contracting, Inc.*, 891 F.2d 1527, 1531-32 (11th Cir.), cert. denied, 111 S. Ct. 353 (1990); *Bailey* v. *USX Corp.*, 850 F.2d 1506, 1509 (11th Cir. 1988); *O'Brien* v. *Sky Chefs, Inc.*, 670 F.2d 864, 869 (9th Cir. 1982); *Pantchenko* v. *C.B. Dolge Co.*, 581 F.2d 1052, 1055 (2d Cir. 1978); *Rutherford* v. *American Bank of Commerce*, 565 F.2d 1162, 1165 (10th Cir. 1977).[7] Those circuits have held that 42 U.S.C. § 2000e-3(a) protects *former* employees against retaliation. Only the Seventh Circuit has held otherwise. See *Reed* v. *Shepard*, 939 F.2d 484, 492-93 (7th Cir. 1991).[8]

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the power to rectify that wrong and when the wrong is accompanied by a retaliatory motive, should not be cognizable under Title VII.

7. Virtually every lower court that has addressed the question has also held that Title VII's anti-retaliation provision covers former employees. See *Bailey* v. *USX Corp.*, 850 F.2d 1506, 1509 (11th Cir. 1988) (collecting cases). See also *Berry* v. *Stevinson Chevrolet*, 59 Fair Empl. Prac. Cas. (BNA) 1571 (D. Colo. 1992) (1992 WL 237240); *Caudill* v. *Farmland Indus., Inc.*, 698 F. Supp. 1476, 1483-85 (W.D. Mo. 1988), aff'd, 919 F.2d 83 (8th Cir. 1990).

The Sixth and D.C. Circuits have applied Title VII's provisions to persons who were neither current nor former employees, but who had a more indirect relationship to the defendant. See, *e.g.*, *Christopher* v. *Stouder Mem. Hosp.*, 936 F.2d 870, 875 (6th Cir.) cert. denied, 112 S. Ct. 658 (1991); *Sibley Mem. Hosp.* v. *Wilson*, 488 F.2d 1338, 1342 (D.C. Cir. 1973); *Shehadeh* v. *Chesapeake & Potomac Tel. Co.*, 595 F.2d 711, 721-22 (D.C. Cir. 1978).

8. In *Reed* v. *Shepard*, 939 F.2d 484 (7th Cir. 1991), the court held that the plaintiff failed to make out a prima facie retaliation case because (1) she did not engage in protected activity, and (2) the alleged retaliation occurred after her termination and was therefore not an adverse employment action. The court construed Title VII not

Moreover, the federal government itself -- the beneficiary of the Fourth Circuit's holding in this case -- consistently takes the position that Title VII applies to former employees. See, *e.g.*, App. to Pet. Rehearing, Brief for the Equal Employment Opportunity Commission as Amicus Curiae at 9 n.4. While acknowledging that "most circuits addressing this issue have interpreted 'employee' to include a former employee," the Fourth Circuit labeled their reasoning "unpersuasive" and instead agreed with the Seventh Circuit. App., *infra*, 12a.[9/] This circuit conflict should now be resolved by this Court.

The Fourth Circuit's decision also cannot be reconciled with decisions of the Fifth, Sixth, Eighth, and D.C. Circuits. These courts have granted former employees protection under similar anti-retaliation provisions contained in the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* (29 U.S.C. § 623(d)), and the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA") (29 U.S.C. § 215(a)(3)). See *Passer* v. *American Chem. Soc'y*, 935 F.2d 322, 330-31 (D.C. Cir. 1991) (ADEA); *Caudill* v. *Farmland Indus., Inc.*, 919 F.2d 83, 86 (8th Cir. 1990) (ADEA); *EEOC* v. *Cosmair, Inc.*, 821 F.2d 1085, 1088-89 (5th Cir. 1987) (ADEA); *Dunlop* v. *Carriage Carpet Co.*, 548 F.2d 139 (6th Cir. 1977) (FLSA). Each of these circuits has held that the retaliation provisions in those statutes parallel Title VII's anti-retaliation provision,

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to reach "events subsequent to *and unrelated to* [the plaintiff's] employment." *Id.* at 493 (emphasis added).

9. The court acknowledged that the Second, Tenth, and Eleventh Circuits had held differently. See *Bailey*, 850 F.2d at 1506; *Pantchenko*, 581 F.2d at 1052; *Rutherford*, 565 F.2d at 1162.

and therefore can be relied upon when interpreting Title VII. See *Passer*, 935 F.2d at 330; *Caudill*, 919 F.2d at 86 (adopting reasoning of district court, see 698 F. Supp. 1476, 1484-85 (W.D. Mo. 1988)); *Dunlop*, 548 F.2d at 142-43; *Cosmair*, 821 F.2d at 1088-89.[10/] Thus, in these circuits, Title VII's anti-retaliation provision should be construed to include former employees.

This question is of sufficient importance to merit this Court's review. The Fourth Circuit's radical departure from virtually every other court that has considered the question is unfounded, given the language, history, purpose, and structure of Title VII. As the Eleventh Circuit noted, a "common sense" reading of the retaliation provision's plain language establishes that Title VII's anti-retaliation provision applies to former as well as current employees.[11/] See *Bailey*, 850 F.2d at 1509. The legislative history bears this out. When it enacted Title VII, Congress intended the term "employee" to be defined for purposes of Title VII "in the manner common for Federal statutes." H.R. REP. NO. 914, 88th Cong., 2d Sess., reprinted in 1964 U.S.C.C.A.N. 2391, 2402. As discussed above, anti-retaliation statutes have uniformly

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10. This Court has interpreted statutes similarly. For example, in *EEOC* v. *Commercial Office Products Co.*, 486 U.S. 107, 123-24 (1988), this Court held that an earlier case (*Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 755-56 (1979)), construing a filing provision in the ADEA was "entirely apposite" because the filing provisions in the two statutes are "virtually *in haec verba*; the former having been patterned after the latter." See also *Oscar Mayer*, *supra*.

11. Because it is a remedial statute (see *infra*), Title VII's anti-retaliation provision should be liberally construed. *Rutherford* v. *American Bank of Commerce*, 565 F.2d 1162, 1165 (10th Cir. 1977).

been construed to include former employees within the scope of the term "employee." See, *e.g.*, *Passer*, 935 F.2d at 322; *Cosmair*, 821 F.2d at 1088; *Dunlop*, 548 F.2d at 139.[12/] Thus, Title VII should protect former employees, including Dr. Polsby, from retaliation by those who employed them.

As courts have repeatedly recognized, any different construction undercuts Title VII's remedial purpose. See *Bailey*, 850 F.2d at 1509. Like all anti-retaliation provisions, § 2000e-(3)(a)'s purpose, to "prevent employers from chilling employees' assertions of Title VII rights," can only be served by protecting former as well as current employees. See *Bilka* v. *Pepe's Inc.*, 601 F. Supp. 1254, 1259 (N.D. Ill. 1985). See also *Pantchenko* v. *C.B. Dolge Co.*, 581 F.2d 1052, 1055 (2d Cir. 1978). Thus, § 2000e-3(a) should be construed to include former employees.[13/]

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12. It is a common principle of statutory construction that, when a term such as "employee" is used in federal social legislation, it is not to be narrowly or technically interpreted, but rather "takes color from its surroundings," *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 545 (1940), and is to be "read in the light of the mischief to be corrected and the end to be attained" (*South Chicago Coal & Dock Co.* v. *Bassett*, 309 U.S. 251, 259 (1940)). It carries that principle too far to turn independent contractors into "employees" for statutory purposes (see *Nationwide Mut. Ins. Co.* v. *Darden*, 112 S. Ct. 1344 (1992)), but a large body of case law, to which the committee report directs the courts to look, supports reading "employee" in federal statutes to include former employees when doing so is consistent with the statutory purpose.

13. Interpreting § 2000e-3(a) to extend to former employees is also consistent with the overall structure of Title VII. The statute as a whole "does not require a formal employment relationship between

Limiting Title VII's anti-retaliation provision to current employees not only fails to serve the statute's purpose, but fundamentally undermines Title VII's effectiveness in eradicating employment discrimination by discouraging a class of potential claimants from filing claims. Under the Fourth Circuit's regime, Title VII claimants who had been discriminatorily discharged or voluntarily or involuntarily leave an employer because of workplace discrimination cannot hold their former employers accountable for retaliation. Their former employers are free to retaliate against them by, for example, refusing to provide recommendations needed to obtain subsequent employment, thus virtually ensuring that those individuals would be denied equivalent employment. See *Rutherford*, 565 F.2d at 1166 (quoting *Hodgson* v. *Charles Martin Inspectors of Petroleum, Inc.*, 459 F.2d 303, 306 (5th Cir. 1972)). When wielded against former employees, this retaliatory weapon is just as imposing, if not more imposing, than the weapons employers can use against current employees.

The consequences of leaving such a sizable class of Title VII claimants unprotected against retaliation for bringing their claims will be devastating. As Congress was clearly aware when it first drafted § 2000e-3(a), an unchecked threat of an employer's retaliation chills employees' willingness to bring unfair employment

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the plaintiff and the defendant. Rather, a plaintiff is protected if the defendant is one 'who significantly affects access of any individual to employment opportunities.'" *Christopher*, 936 F.2d at 875 (quoting *Doe* v. *St. Joseph's Hosp.*, 788 F.2d 411, 422-25 (7th Cir. 1986)).

practices to the attention of the EEOC and the courts.[14/] The federal government has itself recognized as much. See, *e.g.*, App. to Pet. Rehearing, Brief for the Equal Employment Opportunity Commission as Amicus Curiae at 9-11 & n.4. See also *Passer*, 935 F.2d at 330. Thus, in order to protect the integrity and effectiveness of Title VII, this Court should review the Fourth Circuit's decision to deprive former employees of Title VII's anti-retaliation protection and to ensure that the circuits uniformly apply Title VII to this important class of Title VII claimants.

II. THE FOURTH CIRCUIT'S INTERPRETATION OF 29 C.F.R. § 1613.214(A)(4) CONFLICTS WITH THE INTERPRETATION OF THAT PROVISION BY THE D.C. CIRCUIT AND EFFECTIVELY REMOVES THAT CRITICALLY IMPORTANT PROVISION FROM THE CODE OF FEDERAL REGULATIONS

The Court of Appeals' ruling in this case eviscerates 29 U.S.C. § 1613.214(a)(4). Ordinarily, a federal employee must notify an EEO Counselor within 30 days of the matter leading her to believe she had been discriminated against. 29 C.F.R. § 1613.214(a)(1)(i). That 30-day time limit must be extended whenever "the complainant shows that he was not notified of the time limits and was not otherwise aware of them." § 1613.214(a)(4). The Fourth

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14. Congress virtually always appends "anti-retaliation" provisions to remedial employment legislation. See, *e.g.*, National Labor Relations Act, 29 U.S.C. § 158 (1976); Fair Labor Standards Act, 29 U.S.C. § 215(a) (1976); Civil Rights Act, 42 U.S.C. § 1981; Coal Mine Safety and Health Act, 30 U.S.C. § 820(b)(1)(1976); Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(1988).

Circuit's ruling in this case on what a complainant must show in order to raise a triable issue of fact under § 1613.214(a)(4) ensures that virtually no claimant can ever satisfy that provision. In setting such an unachievable threshold, the Fourth Circuit's opinion directly conflicts with the D.C. Circuit's opinion in *Bayer* v. *United States Department of Treasury*, 956 F.2d 330 (D.C. Cir. 1992). That conflict merits this Court's review.

In *Bayer*, the claimant stated in his affidavit that he "was not ever aware or even notified of the requirement that the EEO Counselor had to be notified within 30 days of a discriminatory act." *Bayer*, 956 F.2d at 333. The government conceded that it had not notified Bayer of the time limit. *Ibid.* Bayer also stated that "he reasonably relied on the advice of [National Treasury Employees Union] Chief Steward Joseph that "filing an administrative complaint * * * would adversely [a]ffect his ability to get a favorable reference." *Ibid.* Based on this submission, the D.C. Circuit ruled that the applicability of the 30-day requirement turned on the claimant's awareness or lack of awareness and "*that issue presents a credibility question not susceptible of summary adjudication.*" *Id.* at 334 (emphasis added). Pointing out that "Bayer's affidavit flatly states that he was unaware of the thirty-day requirement," the court concluded that the "sworn statement *precludes any pre-trial judgment that he was indeed aware of the requirement* and is, on that ground, ineligible for the time extension ordered by 29 C.F.R. § 1613.214(a)(4) (emphasis added)." *Ibid.*

In sharp contrast to *Bayer*, the Fourth Circuit in this case held that Dr. Polsby had shown no triable issue of fact even though she too swore to her lack of knowledge

of the 30-day requirement and the government did not state that it had notified her of that limit. However, Dr. Polsby's showing satisfies the regulation. As § 1613.214(a)(4) requires, Dr. Polsby established that she was never notified of or otherwise aware of the 30-day time limit (C.A. App. 580, 725).[15] The agency produced *no* evidence to contradict her. Instead, it merely offered an affidavit that alleged that NIH posts general "information about the [EEO] Program." C.A. App. 694. That affidavit did not state that NIH ever posted any information regarding the *time limit itself*. In fact, the record is devoid of any evidence that NIH posted the time limits.

Even though Dr. Polsby showed that she was not notified or otherwise aware of the time limits and HHS did not explicitly contradict her, the Court of Appeals concluded that there was not even a triable issue of fact as to whether the time limit should have been extended under § 214(a)(4). The court concluded that Dr. Polsby had only showed "that she did not know what was posted and only *believed* that no notice existed." App., *infra*, 9a (emphasis in original). Such a showing, according to the court, was insufficient. However, no claimant could

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[15] Dr. Polsby's lack of personal knowledge of the time requirement has never been questioned. She has stated that "I did not receive any information when I was hired, nor, for that matter, ever see any information to lead me to believe there was a thirty day limit." C.A. App. 580. Her lack of knowledge has been accepted throughout the administrative and adjudicative process. At the administrative stage, NIH explicitly noted that Dr. Polsby had indicated that she did not know of the time limit. C.A. App. 39, 58. The trial court itself recognized that Dr. Polsby was unaware of the 30-day time limit. C.A. App. 732.

honestly say more than Dr. Polsby stated here, *i.e.*, that to the best of her knowledge no time limits were posted. Certainly, no claimant could prove *conclusively* that an agency *never* posted any information regarding the 30-day limit. Yet this is just what the Fourth Circuit required. By holding that Dr. Polsby's proof could not survive a motion for summary judgment, the Fourth Circuit ensured that virtually no claim relying upon § 214(a)(4) will survive a motion for summary judgment, and thus effectively erased § 214(a)(4) from the Code of Federal Regulations.

In doing so, the Fourth Circuit guaranteed that many victims of discrimination will not have their claims addressed. Most federal employees are unaware of the byzantine filing requirements for discrimination charges, particularly the 30-day requirement. This requirement trips up those claimants, even though they diligently pursue a remedy. Section 214(a)(4) responds to this problem by relaxing the harshness of the 30-day filing requirement. Without § 214(a)(4), many claimants would never have their claims heard.[16] The Fourth Circuit's decision strands those claimants on the courthouse steps. For that reason, and because of the circuit conflict, this Court should grant certiorari on this question.

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16. Section 214(a)(4)'s importance is attested to by the frequency with which Title VII claimants rely on the provision to have their claims heard. See, *e.g.*, *Bayer* v. *United States Dept. of Treasury*, 956 F.2d 330 (D.C. Cir. 1992); *Pacheco* v. *Rice*, 966 F.2d 904 (5th Cir. 1992); *Richardson* v. *Frank*, 946 F.2d 901 (10th Cir. 1991); *Rennie* v. *Garrett*, 896 F.2d 1057 (7th Cir. 1990); *Roberts* v. *Thomas*, 884 F.2d 1395 (9th Cir. 1989), cert. denied, 493 U.S. 1058 (1990); *Shea* v. *Tisch*, 870 F.2d 786 (1st Cir. 1989).

III. THE FOURTH CIRCUIT IMPROPERLY INTERPRETED THE MISCONDUCT PRONG OF THE EQUITABLE TOLLING DOCTRINE ENUNCIATED BY THIS COURT IN *IRWIN* V. *VETERANS ADMINISTRATION*, 111 S. CT. 453 (1990)

In *Irwin* v. *Veterans Administration*, 111 S. Ct. 453, 457 (1990), this Court held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." It pointed to two situations in which equitable tolling has been granted in the past: (1) "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period"; and (2) "where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin*, 111 S. Ct. at 458. This Court then commented that courts "have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights." *Ibid.* While acknowledging these principles, the Fourth Circuit ignored the government's misconduct and concluded that Dr. Polsby failed to act diligently. Far from failing to act diligently, Dr. Polsby was victimized by a combination of HHS's failure to publicize the time limit and ignorant and misinformed advice. This case provides the Court an opportunity to clarify confusion in the courts regarding the effect of the federal government's misconduct in equitable tolling cases.

The misconduct that the Fourth Circuit ignored resulted from the agency's failure to discharge its regulatory responsibility under 29 C.F.R. § 1613.204(f) to

"[p]ublicize to its employees and post permanently * * * [t]ime limits for contacting an Equal Employment Opportunity Counselor." As Dr. Polsby stated, she never saw any time limits posted. HHS did not state that those limits were posted. Nevertheless, the court of appeals failed to recognize HHS's disregard for its statutory responsibilities as "misconduct." Instead, without an iota of record support, the court suggested that Dr. Polsby was unaware of the 30-day limit because she had not "diligent[ly] search[ed]" for the filing deadline. App., *infra*, 7a.

Dr. Polsby may not have searched *specifically* for a deadline she never even knew existed, but she was indisputably diligent in seeking out pertinent information about the proper procedures for pursuing a discrimination claim. She discussed her discriminatory treatment with at least two NIH superiors (see C.A. App. 724), the putative EEO Counselor (C.A. App. 553), and other sources outside of NIH (C.A. App. 581), none of whom mentioned the 30-day time limit. In any case, Dr. Polsby's actions in no way excuse the government's misconduct under *Irwin*.[17] This case provides this Court an opportunity to

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17. The court also declined to attribute an act of misconduct to HHS (inducing Dr. Polsby to believe that the person with whom she spoke at NIH was an EEO Counselor). Even if that act of misconduct is not attributable to HHS, it was not the act cited by Dr. Polsby as grounds for equitably tolling the 30-day limit. Instead, Dr. Polsby pointed to the misconduct that occurred when the putative Counselor failed to inform Dr. Polsby of the 30-day time limit and discouraged her from filing a complaint at all. C.A. App. 724. That extreme misconduct was the sort of "induce[ment] into allowing the filing deadline to pass" that supports equitable tolling. *Irwin*, 111 S. Ct. at 458.

clarify the confusion resulting from the Fourth Circuit's misuse of the due diligence comment in *Irwin*.

The Fourth Circuit overlooked the EEO Counselor's actions and instead held that HHS was not responsible for *leading Dr. Polsby to believe that the individual was an EEO Counselor.* That conclusion is itself dubious (an NIH scientist directed Dr. Polsby to the putative EEO Counselor (C.A. App. 724)), and also immaterial. The misconduct stemmed not from leading Dr. Polsby to believe that the person was an EEO Counselor, but from the acts of the putative Counselor herself in failing to inform Dr. Polsby of the 30-day requirement. Whether or not HHS was responsible for leading Dr. Polsby to believe that this individual was an EEO Gounselor, it was responsible for directing Dr. Polsby to a person who induced her to miss the 30-day limit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS,
FOURTH CIRCUIT.

No. 92-1176

M. Maureen POLSBY, Plaintiff-Appellant,

v.

Thomas CHASE; Irwin J. Kopin; Mark Hallett; Daniel R. Weinberger; Giovanni DiChiro; Marinos Dalakis; Richard E. Carson; Murray Goldstein, in his official capacity as director of the National Institute of Neurologic and Communicative Disorders and Stroke; James B. Wyngaarden, in his official capacity as director of the National Institutes of Health; Louis W. Sullivan, Secretary of Health and Human Services, Defendants-Appellees.

Argued May 4, 1992

Decided July 29, 1992

As Amended Aug. 12, 1992

Before WILKINSON, Circuit Judge, CHAPMAN, Senior Circuit Judge, and WILLIAMS, Senior United States District Judge for the Western District of Virginia, sitting by designation.

OPINION

CHAPMAN, Senior Circuit Judge:

M. Maureen Polsby, M.D., brought this suit in the United States District Court for the District of Maryland against various persons at the National Institutes of Health ("NIH") and the Department of Health and Human Services ("HHS") in their official and personal capacities, alleging sex discrimination under Title VII of the Civil Rights Act of 1964, 29 U.S.C. §§ 2000e *et seq.* (1982), and various common law torts. Polsby sought declaratory and injunctive relief as well as damages. The district court dismissed most of the federal claims except for the Title VII claim and refused Polsby leave to amend her complaint to add a claim for violations of RICO. The court then granted the defendants' motion for summary judgment on the grounds that Polsby had failed to bring the complaint to the attention of an EEO counselor within thirty days of the complained of act and that equity did not warrant a waiver or tolling of the time limit. We affirm.

I.

Polsby complains of numerous acts by Dr. Thomas Chase, Director of the National Institute of Neurologic and Communicative Disorders and Stroke (NINCDS),[1] a division of NIH, and others which she claims were sexually discriminatory, while she worked at NINCDS

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1. NINCDS is now the National Institute of Neurological Disorders and Stroke.

from 1983 to 1985. Polsby consulted a person whom she mistakenly thought was an EEO counselor about the sex discrimination. The person did not inform her that a complaint must be brought to the attention of an EEO counselor within thirty days. She also sought the advice of others, including at least one attorney, who erroneously told her that she had six months before being time barred.

In June 1985, Polsby was informed that her contract would not be extended another year. She left NINCDS on July 9, 1985, and talked with an EEO counselor on December 13, 1985. The counselor stated that "while [her] complaint was initiated more than 30 days after the alleged discrimination, counseling would proceed and the timeliness of the complaint would be determined by the [HHS] if a formal complaint is filed." Polsby filed a formal administrative complaint in January 1986.

In December 1985, Polsby, seeking board certification, requested that a letter, from NINCDS describing her training at the department, be sent to the American Board of Psychiatry and Neurology. Dr. Hallett, who was not "formally aware" of the complaint, wrote the letter on December 24, 1985. After discussing the training program in which Polsby was involved, he added that, while Polsby did receive training, a year's credit toward residency "training" requirements was no longer being given. After learning that she would not receive the year's credit, she twice asked Hallett to correct this, claiming that this policy took effect after she had accepted the position and that Chase assured her that she would receive residency credit. Hallett refused the

request. Polsby claims that thereafter the defendants began to slander her professional competence.

In March 1988, the Proposed Disposition of her claim, which became the Final Disposition, was issued and simply noted that Polsby stated that she did not file within thirty days because of erroneous advice. While the Disposition made no mention of abandoning the statutory time limit, Polsby assumed that it was no longer an issue. The Proposed Disposition also found that the evidence did not support Polsby's claims.

Upon the Proposed Disposition becoming final, Polsby filed a pro se complaint, with the help of an attorney, alleging sex discrimination in violation of Title VII and certain common law torts. The district court dismissed the common law claims and some of the defendants. On September 25, 1989, HHS filed an answer admitting that Polsby's claim had been "accepted" by HHS and that she had exhausted her administrative remedies. It raised no affirmative defenses. In the fall of 1989, Polsby retained counsel.

Polsby also claims that, in December 1989, she discovered that some of the defendants had appropriated her research and used it in a scientific article which they had published without her consent. Polsby asserts that, because the article also contained fabricated data, it harmed her reputation. She moved for leave to amend her complaint to add RICO and common law tort claims and join other defendants. The court denied the motion, finding that the claims were simply a restatement of the dismissed claims involving the same defendants and that Title VII was her exclusive remedy.

On July 15, 1992, HHS moved for summary judgment on the grounds that the claims were time barred and that Polsby could not make out a prima facie case of retaliation. The court granted the motion on the first ground and did not discuss the second. Polsby appeals, raising the following issues: 1) whether Polsby's claim of sex discrimination under Title VII is time barred; 2) whether Polsby's claim of retaliatory sex discrimination should have survived summary judgment; and 3) whether the district court abused its discretion in denying Polsby leave to amend her complaint to add a RICO claim. In reviewing the district court's decision, we keep in mind that "summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The facts, and the inferences to be drawn from the facts, must be viewed in the light most favorable to the party opposing the motion." *Ballinger v. North Carolina Agric. Extension Serv.*, 815 F.2d 1001, 1004 (4th Cir.), *cert. denied*, 484 U.S. 897, 108 S. Ct. 232, 98 L. Ed. 2d 191 (1987).

II.

A. Whether Polsby's claim of sex discrimination under Title VII is time barred.

[1] A complainant has thirty days to bring to the attention of an EEO counselor allegations of sex discrimination. 29 C.F.R. § 1613.214(a)(1)(i) (1985).[2/]

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2. The district court refers to the 1987 Code of Federal Regulations. However, because the cause of action arose in 1985, we rely on the 1985 Code of Federal Regulations.

This time limit is not jurisdictional. *See Irwin v. Veterans Administration*, ___ U.S. ___, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990). It acts as a statute of limitations and, therefore, is subject to equitable as well as regulatory exceptions. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 102 S. Ct. 1127, 1132, 71 L. Ed. 2d 234 (1982). There is no dispute that Polsby failed to bring the allegations of sex discrimination to the attention of an EEO counselor within thirty days. The issue is whether Polsby is entitled to equitable relief to allow her to proceed despite this failure.

> The Supreme Court has recently stated: Federal courts have typically extended equitable relief only sparingly. We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.

Irwin, ___ U.S. ___, 111 S. Ct. at 457-58 (footnotes omitted). Equitable relief is reserved for only the most deserving complainants.

[2] Polsby claims lack of notice of the thirty day requirement, but she admits that she does not know whether NIH has posted notice of the time limits. She states that there were many notices posted on bulletin boards, but that she was unaware of any indicating the

time limit for sex discrimination complaints. She does not claim that any of the original defendants misrepresented the time limits or otherwise misled her. A grant of equitable relief requires a diligent search by Polsby. "One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 151, 104 S. Ct. 1723, 1725, 80 L. Ed. 2d 196 (1984). Likewise, we have stated:

> The statute of limitations will not be tolled on the basis of equitable estoppel unless the employee's failure to file in timely fashion is the consequence either of a deliberate design by the employer or actions that the employer should unmistakably have understood would cause the employee to delay filing his charge.

Price v. Litton Business Sys., 694 F.2d 963, 965-66 (4th Cir. 1992); *see Felty v. Graves-Humphreys Co.*, 818 F.2d 1126 (4th Cir. 1987). In a factually similar case, the Fifth Circuit remarked:

> In the case at bar, plaintiff's equitable tolling argument is entirely dependent on [the defendant's] failure to post any notice of EEOC procedures and on plaintiff's ignorance of her rights under Title VII. These facts as presented here are insufficient to support equitable tolling. Plaintiff makes no allegation that [the defendant] misled her concerning her Title VII rights or misrepresented any of the facts which would support her cause of action.

Cruce v. Brazosport Indep. Sch. Dist., 703 F.2d 862, 864 (5th Cir. 1983).

Polsby did consult during this time period with at least one attorney, who advised her that she had six months in which to bring her complaint to the attention of an EEO counselor. While it is unfortunate that she received this erroneous advice, the HHS does not bear responsibility for the mistaken counsel of an attorney with whom Polsby consulted.

Polsby complains bitterly that a person described to her as an EEO counselor and with whom she first consulted did not inform her of the time limit. Polsby, however, does not claim that any of the defendants led her to make the assumption that the person was an EEO counselor. Again, HHS should not have to bear the responsibility for mistakes by Polsby where it did nothing to mislead her. As stated by the Supreme Court, "[p]rocedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants." *Baldwin County Welcome Ctr.*, 466 U.S. at 152, 104 S. Ct. at 1726. Under these circumstances, we find that waiver and equitable tolling are inappropriate.

[3] Polsby also contends that the time bar defense is an affirmative defense which, according to Fed. R. Civ. P. 8(c), must be raised in the answer. Polsby points out that HHS has not raised the defense. However, we have allowed affirmative defenses to be pled in pre-trial motions and cannot find any abuse of discretion by the district court in permitting HHS to raise this defense after

the answer. *See Peterson v. Air Line Pilots Ass'n Int'l.*, 759 F.2d 1161, 1164 (4th Cir.), *cert. denied*, 474 U.S. 946, 106 S. Ct. 312, 88 L. Ed. 2d 289 (1985).

[4] Polsby further claims that a federal regulation requires HHS to extend the time limit where the complainant did not know of the time limit. The regulation provides in pertinent part:

> The agency shall extend the time limits in this section: (i) When the complainant shows that he was not notified of the time limits *and* was not otherwise aware of them, or that he was prevented by circumstances beyond his control from submitting the matter within the time limits; (ii) or for other reasons considered sufficient by the agency.

29 C.F.R. § 1613.214(a)(4) (1985) (emphasis added). Polsby, however, misconstrues the regulation. It is clear that an extension of the time limit is mandatory where the complainant has not been notified of the time limits *and* was not otherwise aware of them. Use of the conjunction requires that both parts be satisfied before the extension of time is mandatory. Polsby, however, has failed to demonstrate that the NIH did not post notice of the time limits. She alleges simply that she did not know what was posted and only *believed* that no notice existed.

B. Whether Polsby's claim of retaliatory sex discrimination should have survived summary judgment.

[5] Polsby argues that the district court's holding that the underlying sex discrimination claims were time barred should not have foreclosed the retaliatory claims. A complainant may request consolidation of a reprisal claim with the underlying claims as long as the request is made "within 30 calendar days of occurrence of the act which forms the basis of the allegation." 29 C.F.R. § 1613.262(b) (1985). Polsby asserts that the letter from Hallett to the American Board of Psychiatry and Neurology explaining the training program was a retaliatory act. However, the complained of letter was written on December 24, 1985, more than thirty days before the formal complaint was amended on February 19, 1986, to include the alleged acts of retaliation.

[6] Polsby also claims that her requests to Hallett asking him to correct the allegedly incorrect information in the letter constituted a second act of retaliation. If we were to accept such a proposition, the time limit would be devoid of any effect. A complainant could easily circumvent the time limit by simply demanding that the perpetrator of the discrimination right the wrong, and, if the person declines, thereby create a second retaliatory action with a fresh thirty day time limit.[3]

[7] Regardless of the foregoing, we find that Title VII provides no cause of action against a former employer

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3. We note that a "continuing violation" is distinct from a violation arising simply from the failure to correct a past discrimination. A "continuing violation" involves a continuing employment practice which is discriminatory. *See Delaware State College v. Ricks*, 449 U.S. 250, 101 S. Ct. 498, 66 L.Ed.2d 431 (1980).

by an ex-employee for acts of retaliation after the employment had ended. Section 2000e-3(a) states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a) (1982). The statute specifically indicates that it is unlawful for an employer to retaliate against an employee or an applicant for employment. No mention is made of former employees. Given that Congress considered it necessary to add "applicant for employment" as a person distinct from an "employee" to be protected from retaliation, Congress could certainly have also included a former employee if it had desired.

[8] Furthermore, the type of practices which are forbidden are those particularly related to employment. Specifically, "unlawful employment practice" is defined in part as the failure or refusal "to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (1982). The definition comprises discrimination with respect to certain aspects of employment. Title VII does not redress discriminatory practices, however unsavory, which occur after the

employment relationship has ended.[4/] As we have stated, "Title VII is not a 'bad acts' statute." *Holder v. City of Raleigh*, 867 F.2d 823, 828 (4th Cir. 1989).

While we are aware that most circuits addressing this issue have interpreted "employee" to include a former employee, *see Bailey v. USX Corp.*, 850 F.2d 1506 (11th Cir. 1988); *Pantchenko v. C.B. Dolge Co.*, 581 F.2d 1052 (2d Cir. 1978); *Rutherford v. American Bank of Commerce*, 565 F.2d 1162 (10th Cir. 1977), we find their reasoning unpersuasive and follow the lead of the Seventh Circuit. *See Reed v. Shepard*, 939 F.2d 484 (7th Cir. 1991). The circuits which have read former employee into the statute have based their decisions entirely on dubious considerations of policy and the supposed purpose of the statute, ignoring its clear language. The Supreme Court has often reminded lower courts that the language of a statute should be interpreted according to its ordinary, contemporary, and common meaning.

> The task of resolving the dispute over the meaning of [a section to a statute] begins where all such inquiries must begin: with the language of the statute itself . . . In this case, it is also where the inquiry should end, for where, as here, the statute's language is plain, "the sole function of the courts is to enforce it according to its terms."

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4. As discussed below, Title VII does redress discriminatory practices by a prospective employer who denies employment to an applicant who has participated in a Title VII action against a former employer. *See infra* pages 1365-66.

United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241, 109 S. Ct. 1026, 1030, 103 L. Ed. 2d 290 (1989) (citations omitted).

Furthermore, as articulated in Chief Judge Tjoflat's concurrence in *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1536-42 (11th Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 353, 112 L. Ed. 2d 317 (1990), *and overruled on other grounds, McGinnis v. Ingram Equip. Co.*, 918 F.2d 1491 (11th Cir. 1990) (en banc), the paucity of legislative history, if offering any guidance on the issue, and policy considerations actually support a normal reading of the statute without adding former employees. The purposes of Title VII are (1) to afford minorities the opportunity to "be hired on the basis of merit," *see* 110 Cong. Rec. 6549 (1964) (remarks of Senator Humphrey introducing the bill), and (2) to "eliminate . . . discrimination in employment based on race, color, religion, or national origin." H.R. Rep. No. 914, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Code Cong. & Admin. News 2355, 2391, 2401; *see* H.R. Rep. No. 238, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code & Cong. Admin. News 2137, 2141 (adding gender).

To accomplish these goals, Congress created the Equal Employment Opportunity Commission. The EEOC attempts to achieve these goals through the "preferred" methods of "cooperation and voluntary compliance." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44, 94 S. Ct. 1011, 1017, 39 L. Ed. 2d 147 (1974). If these methods fail, then the EEOC or individual complainant may seek *equitable* remedies from the courts. Section 2000e-5(g) provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of its employees, with or without back pay . . ., or any other *equitable* relief as the court deems proper.

42 U.S.C. § 2000e-5(g) (1982) (emphasis added). We note that no legal remedies are provided. *See Eastman v. Virginia Polytechnic Institute and State Univ.*, 939 F.2d 204, 208 (4th Cir. 1991) ("Title VII has consistently been limited to allow only equitable relief such as reinstatement, back pay, and injunctions against further violations.").

These equitable remedies are particularly suited to making a complainant whole without penalizing the employer. *See Van Hoomissen v. Xerox Corp.*, 368 F.Supp. 829, 836 (N.D. Cal. 1973) (Congress "had in mind a wide panorama of equitable tools that courts might use but did not intend that courts would punish defendants by imposing upon them large money awards.") In successful Title VII actions, an applicant for employment will probably be hired for the job which was discriminatorily denied. Likewise, an employee will probably be promoted or reinstated to the job which was discriminatorily denied. However, it is much more difficult to fashion equitable relief for a former employee who was the victim of post-employment retaliation. While relief must be in the form of making the former employee whole as if the retaliatory

act had not occurred, the equitable means to accomplish this goal are lacking.[5/] Such relief would entail calculating future damages and is far too speculative.

For example, if the former employer wrote poor references in retaliation, the employee would have to show that but for the poor references, she would have received one of the jobs she was seeking. *See Sherman*, 891 F.2d at 1538. If successful, she then must give the court evidence as to which job, pay scale, promotions, bonuses, etc. . . ., she would have received. *See id.* Because employment opportunities greatly differ from each other, speculation would necessarily rule any calculations. Although a situation may arise where fashioning equitable relief presents no problem, the better solution is to allow the ex-employee to seek either state or other federal law remedies against the *former* employer or the same Title VII remedies against the *prospective* employer who based its decision not to employ the ex-employee on the fact that she sought Title VII relief from a prior employer.[6/] Otherwise, a decision incorporating "former employee" into "employee" could lead to a situation where a former employee, for whom the court could not fashion equitable relief, finds that all other

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5. For example, reinstatement is not an option because the claimed retaliatory acts occurred *after* termination. Of course, if an employee has a claim against the former employer for an "unlawful" termination in retaliation for the employee seeking redress under Title VII, the cause of action is cognizable under 42 U.S.C. § 2000e-3(a) (1982).

6. Section 2000e-3(a) provides that discrimination by an employer against an employee or applicant for employment who has participated in a Title VII action is an unlawful employment practice. 42 U.S.C. § 2000e-3(a) (1982).

judicial remedies are preempted, *see Brown v. GSA,* 425 U.S. 820, 835, 96 S. Ct. 1961, 1969, 48 L. Ed. 2d 402 (1976) (Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment."), and would go a long way to prove the adage that hard cases make bad law.

Regardless of legislative history and policy considerations, the clear language of the statute refers to employees and applicants for employment and does not mention former employees. The statute also specifies that the practices which are prohibited are those generally involving discrimination in some aspect of employment, and not post-employment activity. As previously stated, we are bound to follow the clear language of the statute absent a "'scrivener's error' producing an absurd result." *Union Bank v. Wolas,* ___ U.S. ___, 112 S. Ct. 527, 534, 116 L. Ed. 2d 514 (1991) (Scalia, J. concurring). However, coupled with a discussion of the policy considerations of Congress, it becomes even more likely that Congress said what it meant. Hence, Polsby's claims of retaliatory acts, including the letter to the neurology board and the slander occurring after employment, are not cognizable under Title VII.

C. Whether the district court abused its discretion in refusing Polsby leave to amend her complaint to add a RICO claim.

[9] First, we note that the denial by a district court of leave to amend a complaint is reviewed under the abuse of discretion standard. *Harman v. First American Bank (In re Jeffrey Bigelow Design Group, Inc.),* 956 F.2d 479, 481 (4th Cir. 1992). Polsby claims that the

misappropriation of her research and the harm resulting from the publication of her name on work with fabricated data is actionable regardless of sex discrimination. While she may be correct, her allegations do not support a claim for a RICO violation. Polsby states that her RICO claim alleges "that the defendants appropriated her research projects, fabricated part of the research data, and published the research, in some instances using Dr. Polsby as fourth author without her knowledge or permission and in other instances not crediting her at all." (Appellant's brief, 48). Polsby admits that her discrimination claims are not part of her RICO claim, leaving only the allegations of appropriation of her work. Such allegations fall short of meeting the requirements of a RICO claim.

One of the requirements of a RICO claim is that a pattern of racketeering activity exists. To prove "a pattern of racketeering activity a plaintiff . . . must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239, 109 S. Ct. 2893, 2900, 106 L. Ed. 2d 195 (1989) (emphasis in original). In delineating this continuity requirement, the Court explained: "'Continuity' is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241, 109 S. Ct. at 2902.

Polsby's allegations, however, lack any evidence of continuity to establish a pattern of racketeering activity. Polsby alleges simply that the defendants appropriated some of her work. The perpetrators are few, there is but one victim, and the instance isolated. "To allow a 'pattern

of racketeering' to flow from a single, limited scheme such as this one would undermine Congress' intent that RICO serve as a weapon against on-going unlawful activities whose scope and persistence pose a special threat to social well-being." *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 155 (4th Cir. 1987). As we have also stated, "If the pattern requirement has any force whatsoever, it is to prevent this type of ordinary . . . fraud from being transformed into a federal RICO claim." *Menasco, Inc. v. Wasserman*, 886 F.2d 681, 685 (4th Cir. 1989).

For the foregoing reasons, we affirm the decision of the district court.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 91-2387
CA-88-2344-HAR

M. MAUREEN POLSBY, Plaintiff-Appellant

v.

THOMAS CHASE; IRWIN J. KOPIN; MARK HALLETT; DANIEL R. WEINBERGER; GIOVANNI DICHIRO; MARINOS DALAKIS; RICHARD E. CARSON; MURRAY GOLDSTEIN, in his official capacity as director of the National Institute of Neurologic and Communicative Disorders and Stroke; JAMES B. WYNGAARDEN, in his official capacity as director of the National Institutes of Health; LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, Defendants-Appellees

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No. 92-1176
CA-88-2344-HAR

M. MAUREEN POLSBY, Plaintiff-Appellant

v.

THOMAS CHASE; IRWIN J. KOPIN; MARK HALLETT; DANIEL R. WEINBERGER; GIOVANNI DICHIRO; MARINOS DALAKIS; RICHARD E. CARSON; MURRAY GOLDSTEIN, in his official capacity as director of the National Institute of Neurologic and Communicative Disorders and Stroke; JAMES B. WYNGAARDEN, in his official capacity as director of the National Institutes of Health; LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, Defendants-Appellees

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Filed September 8, 1992

On Petition for Rehearing with Suggestion for Rehearing In Banc

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Appellant filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Chapman, with the concurrence of Judge Wilkinson and Judge Williams, Senior United States District Judge for the Western District of Virginia, sitting by designation.

For the Court,

/s/ Bert M. Montague
CLERK

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. HAR 88-2344

DR. M. MAUREEN POLSBY, Plaintiff

v.

DR. THOMAS CHASE, et al., Defendants

Filed: [August 28], 1989

M. Maureen Polsby, M.D., Washington, D.C., plaintiff pro se.

David P. King, Esquire, Assistant United States Attorney, Baltimore, Maryland (Breckinridge L. Willcox, Esquire, United States Attorney, Baltimore, Maryland; Timothy M. White, Esquire, Elizabeth Jordan Gianturco, and the Office of the General Counsel, Department of Health and Human Services, Washington, D.C.; on the brief)

MEMORANDUM OPINION

M. Maureen Polsby, M.D. ("Dr. Polsby"), plaintiff in this action, was employed by the National Institute of

Neurological and Communicative Diseases [sic] and Stroke ("NINCDS"), a division of the National Institutes of Health ("NIH") in Bethesda, Maryland, as a Medical Staff Fellow on a two-year appointment from July 10, 1983 to July 9, 1985. Several months after the expiration of her appointment, Dr. Polsby met with an Equal Employment Opportunity ("EEO") counselor, and alleged that she had received disparate treatment in "her work assignments and research opportunities" during her tenure as a Fellow at the NINCDS. *See* Defendants' Exhibit 1 at 1 (Final EEO Counseling Report).

Subsequent to receiving the Final EEO Counseling Report, Dr. Polsby filed an employment discrimination complaint with the Department of Health and Human Services ("HHS"), of which the NINCDS and NIH are part. Dr. Polsby's claim was denied by HHS on July 11, 1988, after finding that her allegations were "not supported by the evidence of record." Defendants' Exhibit 4 (Proposed Disposition); *see also* Defendants' Exhibit 5 (Letter of July 11, 1988 from Robert E. Windom to John M. Clifford).

Approximately one month later, on August 10, 1988, Dr. Polsby filed the above-captioned action, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Secs. 2000e1-17, and numerous state law counts.

Dr. Polsby filed suit against numerous officials of the NINCDS and NIH in both individual and official capacties [sic]; she also filed suit against the Secretary of

Health and Human Services, Otis R. Bowen, M.D.[1/] The defendants have filed in response a motion to dismiss, on numerous grounds relating to the sufficiency of the plaintiff's service of process in this proceeding; they also claim that Dr. Polsby has failed to state a claim for which relief can be granted. The motion was fully briefed, and oral argument was heard on the motion. As stated herein, the motion will be granted in part and denied in part.

Title VII mandates that the only proper defendant in an action charging discrimination in federal employment is "the head of the department, agency, or unit" responsible for such claimed discrimination. 42 U.S.C. Sec. 2000e-16(c). Accordingly, all other defendants must be dismissed. With respect to the effectuation of service against the Secretary, there is some debate as to whether service was ever made. On a motion to dismiss, however, this Court is inclined to take a somewhat lenient view toward Dr. Polsby's purported application of the federal mail service rule. The Court will allow service to proceed against the Secretary of Health and Human Services.

A thorough study of the record in this case as well as the oral argument provided thereto clearly indicates that this is an action for *discrimination*, not harassment. It is well settled that "the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment." *Brown v. General Services Administration*, 425 U.S. 820, 835 (1976).

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1. Louis W. Sullivan, M.D., succeeded Dr. Bowen as Secretary of Health and Human Services in early 1989.

Accordingly, all of the attendant claims must be dismissed.

In concluding, the Court must note that, although it appears that Dr. Polsby is proceeding in this case in a *pro se* capacity, there is also a strong hint of the presence -- or at least assistance -- of trained legal counsel in these proceedings on her behalf. It is submitted that, should such counsel desire to represent Dr. Polsby or participate otherwise in this matter, he or she will be required to enter his or her appearance and proceed according to the rules of this Court. As noted, a separate Order will be entered herewith granting the Defendants' motion in part, exceptions to be noted.

/s/ John R. Hargrove
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. HAR 88-2344

M. MAUREEN POLSBY, Plaintiff

v.

LOUIS W. SULLIVAN, Secretary of Health and Human Services, Defendants

Filed: February [7], 1990

MEMORANDUM OPINION

Presently before this Court is Plaintiff Dr. M. Maureen Polsby's ("Dr. Polsby") Motion for Leave to File First Amended Complaint pursuant to F.R.C.P. Rule 15(a). The issues have been fully briefed. No hearing is deemed necessary. Local Rule 105.6.

Facts

Dr. Polsby was employed by the National Institute of Neurological and Communicative Diseases [sic] and Stroke ("NINCDS"), a division of the National Institutes

of Health ("NIH") in Bethesda, Maryland, as a Medical Staff Fellow on a two-year appointment from July 10, 1983 to July 9, 1985. Several months after the expiration of her appointment, Dr. Polsby met with an Equal Employment Opportunity ("EEO") counselor, and alleged that she had received disparate treatment in "her work assignments and research opportunities" during her tenure as a fellow at the NINCDS.

Subsequent to receiving the final EEO Counseling Report, Dr. Polsby filed an employment discrimination complaint with the Department of Health and Human Services ("HHS"), of which the NINCDS and NIH are part. Dr. Polsby's claims were denied by HHS on July 11, 1988, after finding that her allegations were unsupported by the record.

On August 10, 1988, Dr. Polsby filed a complaint with this Court alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e1-17. Dr. Polsby also set out seven common law tort claims essentially based on the same facts as the Title VII claim.[1/] The Secretary of HHS, Otis R. Bowen, M.D., and nine employees of the NINCDS and the NIH were named as defendants.[2/]

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1. The other claims in the original complaint were for intentional infliction of emotional distress, negligence, defamation, tortious interference with contractual relations, fraud, negligent misrepresentation, and conversion.

2. Louis W. Sullivan, M.D., succeeded Dr. Bowen as Secretary of HHS in early 1989.

The Defendants filed a joint motion to dismiss with this Court. At that time Dr. Polsby represented herself *pro se*.[3/] Following a hearing on the motion, this Court dismissed the common law claims and all of the defendants except for the Secretary of Health and Human Services. A scheduling order was issued on September 28, 1989, setting a discovery deadline of December 4, 1989, and a motions deadline of December 22, 1989.

On December 19, 1989, the Court received Defendant's Motion to Compel discovery. The motion was referred to the Honorable Chief Magistrate Clarence E. Goetz of this Court. On January 2, 1990, Dr. Polsby served a praecipe entering the appearance of counsel. She then filed this motion for leave to file an amended complaint in which she seeks to add the seven previously dismissed common law claims and a new claim of RICO.[4/] The amended complaint renames the nine NIH employees previously dismissed from this case, along with one additional NIH employee. In light of this motion, the Court has deferred ruling upon Defendant's motion to compel.

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3. Although Polsby was representing herself *pro se* during this phase of the proceedings, she admitted at oral arguments that she had received assistance from an attorney in preparing her case.

4. This motion was filed ten days after the December 22, 1989, motion deadline. However, th Court does not believe that the parties are prejudiced by having this motion considered despite its untimely nature. *See Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 613 (4th Cir.), *cert. dismissed*, 448 U.S. 911 (1980).

Discussion

Dr. Polsby's Motion for Leave to File First Amended Complaint will be denied. A review of the proposed amended complaint reveals its claims to be almost identical to the claims previously dismissed by this Court on August 28, 1990. The only new claim is for RICO. Likewise, the factual allegations are substantially similar to those from which the previous causes of action were dismissed. The Court has been given no reason by the Plaintiff to alter the previous ruling dismissing the common-law claims.

Essentially, Dr. Polsby seeks only to refile that which has already been settled. As the government rightfully points out, an amended complaint should not be granted when it cannot withstand a new motion to dismiss. Dr. Polsby's proposed complaint cures none of the deficiencies of her claims which were previously dismissed. It would be futile to grant Dr. Polsby leave to file the amended complaint. *See Ward Electronics Service v. First Commercial Bank*, 819 F.2d 496, 497 (4th Cir. 1987); *California Architectural Building Products v. Franciscan Ceramics*, 818 F.2d 1466, 1472 (9th Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S. Ct. 698 (1988). *See also Sandcrest Outpatient Services v. Cumberland County Hospital System, Inc.*, 853 F.2d 1139, 1148-49 (4th Cir. 1988).

Likewise under the "law of the case doctrine," this Court cannot allow Dr. Polsby to refile the same claims which were previously dismissed. *See Messenger v. Anderson*, 225 U.S. 436, 444 (1912) (J. Holmes); *Redfield v. Continental Casualty Co.*, 818 F.2d 596, 605 (7th Cir. 1987) ("when a court decides upon a rule of law, that

decision should continue to govern the same issues in subsequent stages of the same case.").[5/] The purpose of the doctrine is "to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing litigation." 18 Wright, *Federal Practice and Procedure*, § 4478, at 788 (1981 ed.). The "law of the case doctrine" will not be enforced when the Court is convinced that its previous ruling is clearly erroneous and would promote an injustice. *Arizona v. California*, 460 U.S. 618, 460 n.8 (1982). Nothing before this Court leads it to believe that an error has been made.

The Court stands by its previous ruling in this matter. This is a case of federal employment discrimination. It is well settled that "the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment." *Brown v. General Services Administration*, 425 U.S. 820, 835 (1976). Accordingly, Dr. Polsby's Motion for Leave to File First Amended Complaint is denied. Defendant's pending Motion to Compel discovery will again be referred to Chief Magistrate Goetz for final determination. It will be so ordered.

2/7/90
Date

/s/ John R. Hargrove
United States District Judge

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5. The "law of the case doctrine" is usually used in governing a case which has been remanded after appeal. However, the Court sees no reason why the doctrine should not apply in this situation where a party seeks leave to reinstate matters of which the Court has already disposed.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. HAR 88-2344

M. MAUREEN POLSBY, Plaintiff

v.

LOUIS W. SULLIVAN, Secretary of Health
and Human Services, Defendants

Filed: [November 25,] 1991

MEMORANDUM OPINION

Presently before this Court is a Motion for Summary Judgment, submitted by Defendant Louis W. Sullivan, Secretary of Health and Human Services, on grounds that Plaintiff M. Maureen Polsby, M.D.'s sex discrimination claims are time barred and that she cannot establish a prima facie case of retaliation. The issues have been fully briefed. No hearing is deemed necessary. Local Rule 105.6

FACTS

Plaintiff began a two-year medical staff fellowship on July 10, 1983, at the National Institute of Neurological and Communicative Disorders and Stroke, part of the National Institutes of Health ("NIH"). Plaintiff's two-year term of employment ended on July 9, 1985. Over five months later, on December 13, 1985, Plaintiff contacted the NIH Division of Equal Opportunity to allege that she had been the victim of sex discrimination when she was a medical staff fellow.

I.

Defendant first moves for summary judgment on grounds that Plaintiff's claim was not timely filed and is therefore time-barred.

Plaintiff's claim arises under Title VII of the Civil Rights Act of 1964, as amended, which protects all federal employees from sex discrimination. Regulations adopted pursuant to Title VII requires that federal employees bring matters causing them to believe that they have been discriminated against within thirty days of the discriminatory action, or within thirty days of the date when they knew or reasonably should have known of the discriminatory event. 29 CFR 1613.214(a)(4) (1987).

In the case at bar, Plaintiff filed a Complaint with the EEO office at NIH over five months after her fellowship ended. As such, Plaintiff's claim is time-barred under the thirty-day rule.

Plaintiff argues that administrative timely filing is not a jurisdictional prerequisite to suit in federal court. The Supreme Court has addressed precisely this issue:

> We hold that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling. The structure of Title VII, the congressional policy underlying it, and the reasoning of our cases all lead to this conclusion.

Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982). *See also, Love v. Pullman Co.*, 404 U.S. 522 (1972). Thus, Plaintiff is correct that under *Zipes*, a Plaintiff filing a late complaint with the EEOC is not automatically barred from bringing suit. However, the Plaintiff must make some showing that a doctrine such as waiver, estoppel, or equitable tolling applies to permit untimely filing in this case.

Plaintiff argues under *Huntley v. Dept. of Health, Education & Welfare*, 550 F.2d 290 (5th Cir. 1977) that the EEO agency's acceptance of her allegations for investigation after the thirty-day period constituted a waiver of the timeliness objection. However, as Defendants note, the Fifth Circuit later explained that:

> The *Huntley* holding is limited to the situation in which the agency has in fact made a finding of discrimination, and we reject [the] . . . contention that the federal

> agency, by merely accepting and investigating a tardy complaint, automatically waives its objection to the complainant's failure to comply with the prescribed time delays.

Oaxaca v. Roscoe, 641 F.2d 386, 390 (5th Cir. 1981). As such, the *Huntley* doctrine does not apply in the case at bar because the agency did not make a finding of discrimination.

In addition, Plaintiff claims that the doctrine of estoppel defeats the Defendant's assertion of the time bar. Plaintiff argues under *Reeb v. Economic Opportunity Atlanta, Inc.*, 526 F.2d 924 (5th Cir. 1975), that estoppel applies because of continuing discrimination against Plaintiff in the form of affirmative misconduct by NIH doctors once she filed her EEO Complaint. Plaintiff claims that the continuing discrimination occurred "when Plaintiff was falsely informed that her third year of the Fellowship was not extended because her research was inadequate," and when "Plaintiff's research was [later] published and officially presented without her knowledge or approval".

In *Reeb*, the Plaintiff claimed that it was not until six months after the discriminatory act that she became aware of the facts which would have alerted her to the discrimination. The Court stated that "the statute does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonable prudent regard for his rights." *Id.* However, "the claimant must be reasonably prudent in exercising potential opportunities to discover putative

discrimination." *Hamilton v. 1st Source Bank*, 895 F.2d 159, 163 (4th Cir. 1990), *vacated in part, on reh'g en banc*, 928 F.2d 86 (4th Cir. 1990). Plaintiff has made no showing that she was reasonably unaware of facts alerting her to discrimination until after the deadline.

Defendant points out that in *Moore v. Toll*, 43 Fair Empl. Prac. Cas. 1087 (D. Md. 1987), this Court held it inappropriate to apply the continuing violation theory to a claim of discriminatory discharge:

> Here the Plaintiff is attempting to argue that subsequent allegedly discriminatory acts allowed him to 'discover' that the initial act was discriminatory. This hindsight argument fails. The discovery rule provides that limitations accrue from the time a plaintiff knew, or with due diligence should have discovered, the injury. In employment discrimination cases, this date has consistently been calculated as the date the employee receives notification of termination.

As the Court in *Hamilton* noted, at the time when an employee is discharged, that person is on notice to inquire whether discrimination motivated the discharge, and if the employee suspects discrimination, the employee must seek EEO counseling within the thirty day period. 895 F.2d at 164. "It is notice of the employer's actions, *not* the notice of a discriminatory effect or motivation that establishes the commencement of the pertinent filing period." *Hamilton v. 1st Source Bank*, 928 F.2d at 89. Under this analysis, Plaintiff cannot successfully apply the continuing

discrimination theory in order to avoid the thirty day rule. Upon her discharge, Plaintiff was on notice to inquire as to whether the employer's actions were discriminatory, and to seek EEO counseling within thirty days of her termination. Because she failed to do this, she is barred from asserting her discrimination claim.

Plaintiff also argues that the thirty-day filing limit should not apply "because Plaintiff was never given and never saw any written materials relating to pursuing employment related problems." Essentially, Plaintiff argues that she met with a former EEO counselor who never told her about the thirty day time limit for filing, and that she was "being misled by NIH "higher ups". These bare allegations do not provide Plaintiff with the necessary showing of such doctrines as waiver, tolling, or estoppel. Plaintiff has failed to overcome the thirty day requirement and to withstand Defendant's Motion for Summary Judgment. The thirty day period is indeed a short period of time for a layperson to take the necessary steps to seek EEO counseling. However, the thirty day rule has been clearly set forth in the Title VII regulations, and the case at bar does not present a situations in which the rule can be avoided.

Because the court finds that Plaintiff's claims are time-barred, the court need not reach Defendant's argument that Plaintiff's claim of retaliation cannot stand because she cannot establish a prima facie case. Defendant's Motion for Summary Judgment is granted. It will be so ordered.

11/25/91
Date

/s/ John R. Hargrove
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. HAR 88-2344

M. MAUREEN POLSBY, Plaintiff

v.

LOUIS W. SULLIVAN, Secretary of Health
and Human Services, Defendants

[Filed: December 12, 1991]

ORDER

Presently before this Court is a Motion for Reconsideration of this Court's Order granting Defendant's Motion for Summary Judgment and dismissing Plaintiff's sex discrimination claim and her claim for retaliation. In its Order, this Court held that Plaintiff's sex discrimination claims were time barred. No hearing is deemed necessary. Local Rule 105.6.

Plaintiff has submitted to this Court an elaborate affidavit describing her experience at the National Institute [sic] of Health and her treatment by individuals at NIH following her employment there. She describes a sexist atmosphere at NIH, discriminatory treatment at NIH, and retaliatory conduct by NIH following the filing of her EEO Complaint.

Plaintiff expresses her view that the thirty day time limit for filing a complaint is unfairly short, and that the system is stacked against complainants. The Court appreciates the frustration of the Plaintiff in that she was not aware of the thirty day time limit, that the period is indeed a short one, and that the Court is unable to reach the merits of her Complaint because of the time limitation. While, as Plaintiff notes, Congress may be considering extending the filing period, the Court is bound to apply the law as it exists at the present time in the cases before it. As such, the thirty day limit acts to bar Plaintiff's action before this Court.

Therefore, this Court respectfully denies Plaintiff's Motion for Reconsideration. It will be so ordered.

12/12/91
Date

/s/ John R. Hargrove
United States District Judge

Supreme Court, U.S.
FILED
MAR 5 1993
OFFICE OF THE CLERK

No. 92-966

In the Supreme Court of the United States

OCTOBER TERM, 1992

M. MAUREEN POLSBY, PETITIONER

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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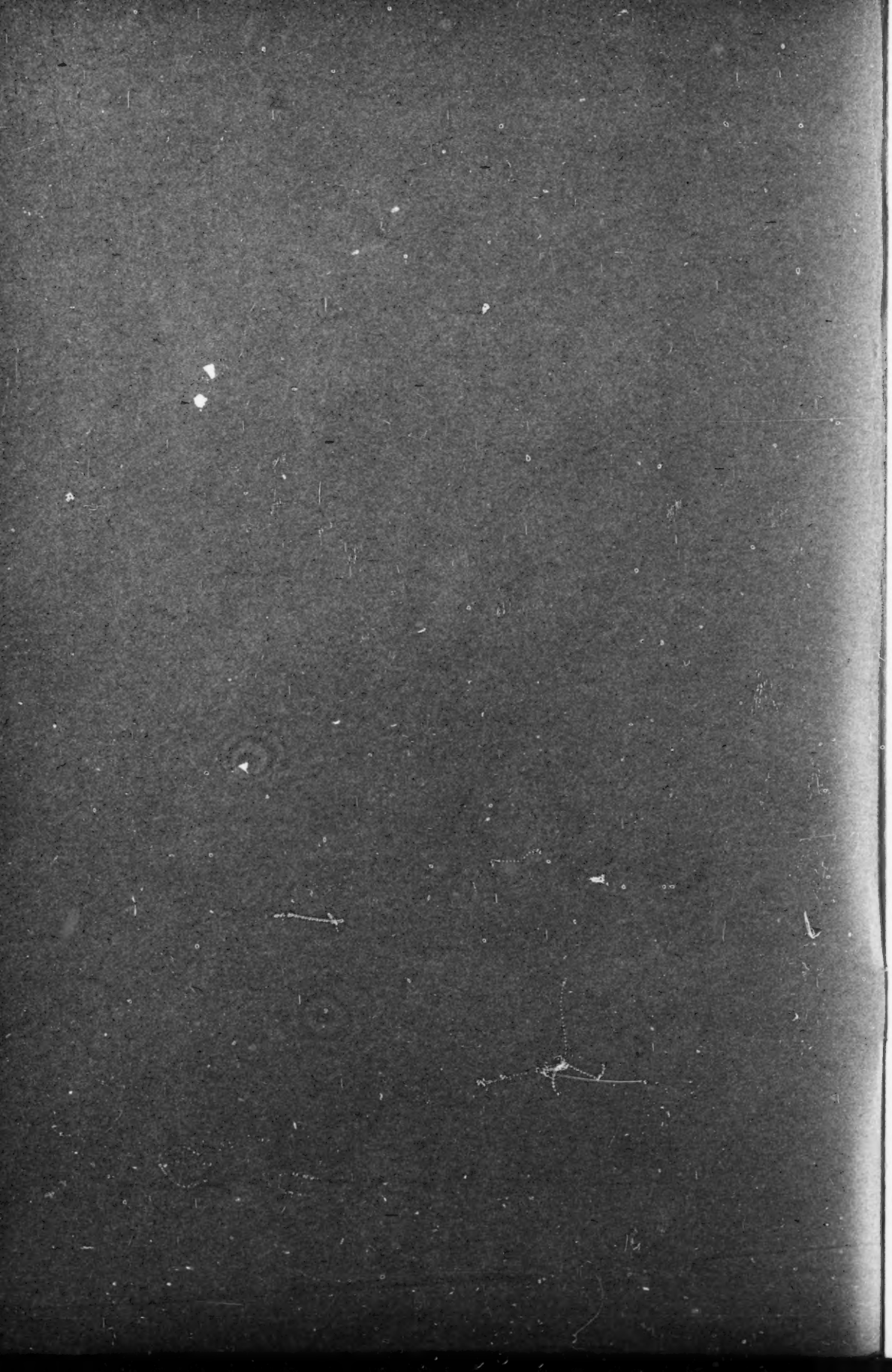

QUESTIONS PRESENTED

1. Whether Title VII's provision barring an employer from "discriminat[ing] against any of his employees or applicants for employment * * * because he has made a charge * * * under [Title VII]," 42 U.S.C. 2000e-3(a), protects individuals against retaliation that occurs after they leave the employer's service.

2. Whether the lower courts correctly ruled that petitioner failed to establish that her employer violated its obligation under 29 C.F.R. 1613.214(a) (1985) to notify her of the 30-day time limit for contacting an Equal Employment Opportunity counselor in connection with a claim of employment discrimination by a federal agency.

3. Whether the lower courts correctly ruled that petitioner was not entitled to equitable tolling of the deadline for pursuing her charge of employment discrimination.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-966

M. MAUREEN POLSBY, PETITIONER

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 970 F.2d 1360. The opinion of the district court (Pet. App. 31a-37a) is unreported. Related opinions of the district court (Pet. App. 22a-25a, 26a-30a) also are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1992.[1] The court of appeals denied a petition for rehearing on September 8, 1992. Pet. App. 19a-21a. The

[1] The court of appeals issued an amended opinion on August 12, 1992. Pet. App. 1a-18a.

petition for a writ of certiorari was filed on December 7, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner held a two-year medical fellowship at the National Institute of Neurologic and Communicative Disorders and Stroke of the National Institutes of Health (NINCDS) from 1983 to 1985. Pet. App. 2a-3a, 32a. This case arises out of her allegations that she suffered employment discrimination on two occasions in connection with that employment.

a. In June 1985 petitioner was informed that her contract would not be extended for an additional year. She consulted a person whom she erroneously believed to be an Equal Employment Opportunity (EEO) counselor about her belief that her supervisor Dr. Thomas Chase had discriminated against her on the basis of sex; that person did not inform her that 29 C.F.R. 1613.214(a)(1)(i) (1985) required her to present such a claim to an EEO counselor within 30 days.[2] She also consulted an attorney, who incorrectly advised her that she had six months to take action. Petitioner left her employment at NINCDS in July 1985 without consulting an EEO counselor.[3] Pet. App. 2a-3a, 32a.

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[2] Effective October 1, 1992, 29 C.F.R. 1613.214 was revised; the corresponding provision, which will appear at 29 C.F.R. 1614.105(a), extends the time limit to 45 days. 57 Fed. Reg. 12,648 (1992).

[3] The EEO officer assigned to NINCDS at the time filed an affidavit in the district court explaining the agency's efforts to promote awareness of the opportunities for redress available under Title VII:

> posters encouraging all employees who felt that they were the victims of discrimination on the basis of * * * sex * * * to contact an EEO Office or an EEO officer or an EEO counselor were prominently displayed in numerous locations in the Clin-

On December 13, 1985, petitioner complained to an EEO counselor that she had experienced sex discrimination at NINCDS. The counselor noted that petitioner's complaint "was initiated more than 30 days after the alleged discrimination," but stated that counseling would proceed "and the timeliness of the complaint would be determined by the [HHS] if a formal complaint is filed." Petitioner filed an administrative complaint in January 1986. Pet. App. 3a.

b. On December 24, 1985, petitioner asked Dr. Mark Hallett, one of her supervisors at NINCDS, for a letter describing her training there, in support of her application for certification by the American Board of Psychiatry and Neurology. Dr. Hallett, who was not then aware of petitioner's December 13 complaint against Dr. Chase,[4] wrote the letter on the same day. The letter described the program in which petitioner had been involved and indicated that it would not justify a year's credit toward residency requirements. Petitioner unsuccessfully asked Dr. Hallett to alter that statement and offer the residency credit. On February 19, 1986, fifty-seven days after Dr. Hallett wrote the letter in question, petitioner amended her administrative complaint to include the allegation that Dr. Hallett's letter constituted retaliation for her EEO complaint. Pet. App. 3a, 10a.

2. The Department of Health and Human Services issued a proposed disposition of petitioner's complaint on March 1, 1988. C.A. App. 55-74. It reviewed petitioner's contentions in detail and concluded that neither Dr.

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ical Center. These posters contained photographs of EEO officers and counselors, their locations and telephone numbers. C.A. App. 693-694.

[4] Dr. Hallett did not learn of the complaint until December 31, 1985, when an EEO counselor contacted him. C.A. App. 289.

Chase nor Dr. Hallett had discriminated against her on the basis of sex. *Id.* at 59-71. The agency adopted the proposed disposition as its final disposition on July 11, 1988. C.A. App. 75-77.

3. Petitioner then filed suit in the United States District Court for the District of Maryland, challenging the government's disposition of her Title VII claims. The district court rejected petitioner's claims and granted summary judgment for the government. Pet. App. 31a-37a. The court noted that it was uncontested that petitioner had failed to comply with her obligation under 29 C.F.R. 1613.214(a)(1)(i) (1985) to present her claim to an EEO counselor within 30 days. See Pet. App. 32a. Although the court agreed with petitioner that the 30-day filing requirement was subject to equitable tolling, it concluded that she had not established any basis for equitable tolling in this case. *Id.* at 33a-36a. In response to petitioner's argument that she was not apprised of the deadline, the court explained that petitioner

> argues that she met with a former EEO counselor who never told her about the thirty day time limit for filing, and that she was "being misled by NIH "higher ups" [*sic*]. These bare allegations do not provide [petitioner] with the necessary showing of such doctrines as waiver, tolling, or estoppel.

Id. at 36a.[5]

4. The court of appeals affirmed. Pet. App. 1a-18a.

a. First, the court considered petitioner's claim that the district court should have granted equitable tolling of the 30-day deadline for consulting an EEO counselor

[5] The district court did not expressly address petitioner's retaliation claim, apparently believing that dismissal of the main claims required dismissal of that claim as well. See Pet. App. 36a (noting that the court had no occasion to consider respondent's alternative defenses to the retaliation claim).

on her claim against Dr. Chase. Pet. App. 5a-9a. The court noted petitioner's statement that she "d[id] not know whether NIH has posted notice of the time limits," *id.* at 6a, but found that statement inadequate to justify equitable tolling, explaining that petitioner did not "claim that any of the original defendants misrepresented the time limits or otherwise misled her," *id.* at 7a. The court concluded that equitable tolling would "requir[e] a diligent search by [petitioner]," because "[o]ne who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Ibid.* In response to petitioner's contention that the individual she erroneously believed to be an EEO counselor failed to advise her of the deadline, the court noted that petitioner did "not claim that any of the defendants led her to make the assumption that the person was an EEO counselor. Again, HHS should not have to bear the responsibility for mistakes by [petitioner] where it did nothing to mislead her." *Id.* at 8a.

b. The court also rejected petitioner's claim that the deadline on her claim against Dr. Chase should have been extended under 29 C.F.R. 1613.214(a)(4) (1985). Pet. App. 9a. As the court explained, that provision requires an agency to extend the 30-day deadline if "the complainant shows that he was not notified of the time limits and was not otherwise aware of them." Although petitioner contended that she was "not otherwise aware of [the deadline]," it rejected petitioner's claim because she "has failed to demonstrate that the NIH did not post notice of the time limits. She alleges simply that she did not know what was posted and only *believed* that no notice existed." *Ibid.*

c. Finally, the court rejected petitioner's complaint against Dr. Hallett. Pet. App. 9a-10a. The court explained that 29 C.F.R. 1613.262(b) (1985) allowed an individual to request consolidation of an underlying com-

plaint with a complaint for retaliation only if the request is made "within 30 calendar days of occurrence of the act which forms the basis of the allegation." Because the act petitioner complained of was a December 24, 1985, letter, her February 19, 1986, complaint was untimely. Pet. App. 10a. The court rejected petitioner's claim that Dr. Hallett's refusals to alter his December 24 letter could be treated as separate acts of retaliation that restarted the deadline, stating that under such a holding "[a] complainant could easily circumvent the time limit by simply demanding that the perpetrator of the discrimination right the wrong, and, if the person declines, thereby create a second retaliatory action with a fresh thirty day time limit." *Ibid.*

The court of appeals went on to suggest, as an alternative basis for rejecting petitioner's retaliation claim, that "Title VII provides no cause of action against a former employer by an ex-employee for acts of retaliation after the employment has ended." Pet. App. 10a-11a; see *id.* at 10a-16a. The court stated that 42 U.S.C. 2000e-3(a) grants rights only to "employees or applicants for employment" and concluded that extending benefits to former employees would be inconsistent with the statutory language. Pet. App. 11a. The court noted that its view on that question differed from the views expressed by the Second, Tenth, and Eleventh Circuits, but chose to follow the view adopted by the Seventh Circuit in *Reed* v. *Shepard*, 939 F.2d 484 (1991). Pet. App. 12a.

ARGUMENT

1. Petitioner's principal contention (Pet. 17-23) is that the court of appeals erred in holding that Title VII's retaliation provision does not protect former em-

ployees.[6] Petitioner correctly notes that the courts of appeals are divided on the question.[7] The decision of the court of appeals does not, however, provide a suitable occasion for the Court to resolve that division, because the court of appeals' views on that question were offered only as an alternative basis for the judgment, following the court's conclusion that petitioner's retaliation claim was not filed in a timely manner.[8] Even if the court of appeals erred in determining that petitioner's retaliation claim was not actionable under Title VII, it still would have rejected the claim as untimely. Hence, because a resolution of the question in petitioner's favor would not alter the judgment of the court of appeals, there is no

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[6] That contention applies only to petitioner's retaliation claim regarding Dr. Hallett's conduct, not her claim of direct discrimination by Dr. Chase.

[7] Four courts of appeals have held that former employees are covered. See, *e.g.*, *Pantchenko* v. *C.B. Dolge Co.*, 581 F.2d 1052, 1055 (2d Cir. 1978) ("[T]he statute prohibits discrimination related to or arising out of an employment relationship, whether or not the person discriminated against is an employee at the time of the discriminatory conduct."); *O'Brien* v. *Sky Chefs, Inc.*, 670 F.2d 864, 869 (9th Cir. 1982) (reversing dismissal of claims of retaliation based on former employer's giving bad recommendations after termination); *Rutherford* v. *American Bank of Commerce*, 565 F.2d 1162, 1165-1166 (10th Cir. 1977) (concluding that "[t]here is no ground for affording any less protection to * * * former employees than to * * * present employees"); *Bailey* v. *USX Corp.*, 850 F.2d 1506, 1509-1510 (11th Cir. 1988) ("We * * * hold that former employees may sue for retaliation under Title VII."). On the other hand, the Fourth Circuit's contrary conclusion in this case is supported by the similar decision of the Seventh Circuit in *Reed* v. *Shepard*, 939 F.2d 484, 492-493 (1991).

[8] The independent nature of the discussion related to the former-employee issue is evident from the court's opinion, which offered that discussion as a basis for dismissal of the retaliation claim "[r]egardless of the foregoing [rejection of that claim as untimely]." Pet. App. 10a.

basis for the Court to review the question in this case. Cf., *e.g.*, *California* v. *Rooney*, 483 U.S. 307, 311 (1987) ("This Court 'reviews judgments, not statements in opinions.'") (quoting *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956)).[9]

The lack of adversary litigation on the first question presented by petitioner also makes this case an inappropriate vehicle for resolving that question. The parties did not brief or argue the question in the court of appeals; the government argued that petitioner was not entitled to relief on her retaliation claim because it was untimely and because petitioner had failed to offer any reason to believe that Dr. Hallett acted in retaliation for her complaint against Dr. Chase (of which he was

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[9] Petitioner only briefly addresses (Pet. 17 n.6) the court of appeals' holding that her retaliation claim was untimely, arguing that the time for filing should have run from the date she learned of the letter, not from the date the letter was written. That argument apparently was not raised in the court of appeals, where petitioner argued (Pet. C.A. Br. 38-39) that the retaliation claim was timely because it challenged a continuing violation. In any event, the regulation in question required a filing 30 days from the date of "the act which forms the basis of the allegation," 29 C.F.R. 1613.262(b) (1985), not 30 days from the date the plaintiff learned of the act. Petitioner cites no support for her reading of the 1985 regulation. The current regulations do not contain an analogous provision. See 57 Fed. Reg. 12,634 (1992) (recodification of procedures for Title VII claims against federal agencies).

Alternatively, petitioner argues (Pet. 17 n.6) that the court should have treated Dr. Hallett's subsequent refusals to alter the letter as entirely separate acts of retaliation, but she fails to address the court of appeals' concern that acceptance of that view would vitiate the filing deadline entirely. In any event, whatever the merits of petitioner's challenges to that holding, she offers no substantial basis for believing that the holding presents a question that would merit review by this Court. Review of the court of appeals' alternative holding by itself would not alter the judgment of the court of appeals.

unaware when he wrote the letter in question). Gov't C.A. Br. 17-20.[10] Moreover, because the government disagrees with the court of appeals' view that the retaliation provisions of Title VII are entirely inapplicable to former employees, neither party in this case supports the conclusion of the court of appeals on that point. In sum, because the decision of the court of appeals constitutes an alternative ground for decision unnecessary to the result and does not rest on an adversary presentation of the question, there is no reason for this Court to consider the question at this time.

2. Petitioner also contends (Pet. 23-26) that the lower courts erred in concluding that petitioner failed to establish that she "was not notified of the time limits" for presenting her complaint of discrimination by Dr. Chase, as required by 29 C.F.R. 1613.214(a)(4) (1985).[11] At bottom, petitioner's claim is that both of the lower courts erred in concluding, based on the record in this case, that

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[10] Although the petition could be read to suggest (Pet. 19) that the Equal Employment Opportunity Commission (EEOC) filed an amicus brief in support of petitioner's petition for rehearing in the court of appeals, in fact petitioner simply attached to her petition for rehearing a brief filed by the EEOC in a different case; the EEOC did not appear in the court of appeals.

[11] That regulation applies only to petitioner's claim of direct discrimination by Dr. Chase, not to her claim regarding retaliation by Dr. Hallett. As noted above, see note 9, *supra*, petitioner's retaliation claim was found untimely under a different provision of the regulations, 29 C.F.R. 1613.262(b) (1985). That regulation, unlike Section 1613.214, did not require the agency to notify the claimant of the time limits. Moreover, it is clear that petitioner knew of the existence of regulatory time limits before she filed her retaliation complaint, because the EEO counselor discussed them with her when he explained that her complaint against Dr. Chase was untimely. See Pet. App. 3a. Accordingly, the merits of petitioner's second question presented do not undermine the validity of the lower courts' dismissal of her retaliation claim.

petitioner failed to establish a genuine issue of material fact sufficient to survive the government's motion for summary judgment under Fed. R. Civ. P. 56. The pertinent legal standards for awarding summary judgment are, of course, well established and were not misstated by the lower courts here. Whether those standards were misapplied on this record is an inherently factbound question that does not merit plenary review by this Court.[12] After careful consideration, however, it is our belief that the courts below were incorrect in concluding that no genuine issue of material fact existed.

The regulation in question provided that the deadline must be extended if "the complainant shows that he was not notified of the time limits." 29 C.F.R. 1613.214(a)(4) (1985). Petitioner submitted an affidavit stating that she "did not receive any information when I was hired, nor, for that matter, ever see any information to lead me to believe there was a thirty day limit." C.A. App. 580. To rebut petitioner's affidavit, the government introduced an affidavit from NINCDS's EEO officer explaining the government's practice of disseminating detailed posters to notify employees of their rights under Title VII. See note 3, *supra*. That affidavit did not state that the posters contained information related to the time limits for pursuing Title VII claims in this context and did not

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[12] Contrary to petitioner's argument (Pet. 24), the decision below does not conflict with the decision of the District of Columbia Circuit in *Bayer* v. *United States Department of Treasury*, 956 F.2d 330 (1992). As petitioner's own discussion makes clear, the notification requirement was not in dispute in *Bayer*; the government "conceded that it had not notified Bayer of the time limit." Pet. 24 (citing *Bayer*, 956 F.2d at 333). The question in *Bayer* was whether the claimant had satisfied the second requirement of the regulation, that he did not have actual knowledge of the filing requirement. That point is not at issue in this case. See Pet. 25 n.15.

otherwise suggest that petitioner had been notified of the deadline.[13] In those circumstances, petitioner's affidavit was sufficient to establish a genuine issue on the material factual question whether she was notified of the time limits. Accordingly, summary judgment on petitioner's claim of discrimination by Dr. Chase was not appropriate under Federal Rule of Civil Procedure 56(c).

3. Finally, petitioner argues (Pet. 27-29) that the lower courts erred in not excusing her failure to comply with the deadline as a matter of equity, even if she did not satisfy the regulatory tolling requirements set forth in 29 C.F.R. 1613.214(a)(4) (1985). That argument does not merit review by this Court. Both of the lower courts agreed with petitioner that equitable tolling would be available in appropriate circumstances, but concluded that she had offered no basis for equitable tolling in this case. As the court of appeals noted, petitioner has not "claim[ed] that [the respondent] misrepresented the time limits or otherwise misled her." Pet. App. 7a. In the absence of affirmative government misconduct,[14] common-

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[13] Applicable regulations require the agency to "[p]ublicize to all employees and post at all times * * * a notice of the time limits and necessity of contacting [an EEO] Counselor before filing a complaint [under Title VII]." 57 Fed. Reg. 12,647 (1992) (to be codified at 29 C.F.R. 1614.102(b)(6)). In our view, this would be a very different case if the record indicated that the posters included information regarding the 30-day time limit imposed by 29 U.S.C. 1613.214(a)(4) (1985).

[14] Petitioner suggests at one point (Pet. 28 n.17) that the government engaged in misconduct by contending that she should be held accountable for the putative counselor's failure to notify her of the 30-day limit. As the court of appeals pointed out, however, petitioner "does not claim that [the government] led her to make the assumption that the person was an EEO counselor." Pet. App. 8a. In the absence of such a claim, the court of appeals correctly ruled that "HHS should not have to bear the responsibility for mistakes by [petitioner] where it did nothing to mislead her." *Ibid.*

law tolling of a regulatory deadline based on the government's failure to advise a complainant of the deadline for presenting a complaint to an EEO officer should not be available if the complainant fails to satisfy the regulatory provision that expressly offers tolling on that basis.

CONCLUSION

For the reasons we have stated, plenary review is not warranted, but it would be appropriate for the Court summarily to grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of the position set forth in this brief.

Respectfully submitted.

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MARCH 1993